STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

AFSCME/IOWA COUNCIL 61, Complainant, and LOUISA COUNTY, Respondent.	)	CASE NO. 8146

DECISION ON APPEAL

This matter is before us on appeal from a proposed decision and order issued by an administrative law judge of the Public Employment Relations Board (PERB or Board) concerning prohibited practice complaints filed by AFSCME/Iowa Council 61 against Louisa County pursuant to Iowa Code section 20.11.[1]

In the complaints AFSCME alleged generally that the County "is imposing a change in the Health Insurance benefits negotiated for the 2008-2011 [collective bargaining agreement] between the parties" and that such actions constituted prohibited practices within the meaning of Iowa Code sections 20.9 and 20.10. The ALJ concluded that the County had committed a prohibited practice by instituting the changes. The County

[1] Two nearly identical complaints were filed by AFSCME, one addressing the County's actions regarding the insurance benefits of a bargaining unit of employees in its Sheriff's Department and the other addressing actions affecting a bargaining unit of employees in the Secondary Roads Department. Although distinct complaints, they were mistakenly docketed under the same case number, and were heard by the ALJ as a single case. Under these circumstances, we treat the matters together as if the complaints had been consolidated by the ALJ, despite the absence of a specific order to that effect.

timely appealed the ALJ's proposed decision and order in accordance with PERB rules.

Pursuant to PERB subrule 621-9.2(3) we have heard the case upon the record submitted before the ALJ. Oral arguments were presented to the Board on August 25, 2010, by Mark Hedberg for AFSCME and Matthew Brick for the County. Both parties filed briefs on appeal. In accordance with Iowa Code section 17A.15(3), in this appeal we possess all powers which we would have possessed had we elected, pursuant to PERB rule 621-2.1, to preside at the evidentiary hearing in place of the ALJ.

As a preliminary of sorts, we note what is and is not at issue in this case. It is apparent from the County's briefs to both the ALJ and to us that it perceives AFSCME's complaints as including the claim that the County bargained in bad faith during the negotiations which culminated in the collective agreements which became effective July 1, 2008. We think this perception is understandable in view of testimony at hearing to the effect that AFSCME's bargaining representative viewed the case as involving "an incident of bad-faith bargaining." But notwithstanding this characterization by a witness at hearing, in its brief to us on appeal AFSCME specifically disclaims any such theory, and we think it clear from the totality of its filings in this matter that its claim is simply that the County committed prohibited practices within the meaning of Iowa Code

sections 20.10(1) and 20.10(2)(a), (e) and (f) when it made unilateral changes in mandatorily negotiable aspects of the two bargaining units' health insurance benefits. Accordingly, we limit our findings and discussion to matters relevant to that theory only.

Based upon our review of the record before the ALJ, and having considered the parties' briefs and oral arguments, we make the following findings of fact and conclusions of law.

FINDINGS OF FACT

AFSCME is the certified bargaining representative of two separate bargaining units of employees of the County, one consisting of certain employees in the Sheriff's Department and the other of certain employees in the Secondary Roads Department. At the time this dispute arose, both units were nearing the end of the first year of separate three-year collective bargaining agreements, each effective from July 1, 2008 through June 30, 2011.

Both of the agreements contain nearly identical provisions concerning the topic of insurance. The agreement covering the unit in the Sheriff's Department provides:

> The Employer agrees to make available a health and major medical group insurance program selected by the Employer for each eligible regular full-time employee. An employee shall pay $48.00 per month toward the single premium cost for the 2008-2011 fiscal years. The Employer will pay the balance of the premium cost during all three years. An employee shall pay $103.00

per month toward the family premium for the 2008-2011 fiscal years. The Employer will pay the balance of the premium cost during all three years.

The insurance program referred to in this contract shall be subject to all terms and conditions of the contract with the insurance carrier(s) selected by the Employer. An employee has the option to upgrade his/her insurance from the current basis plan. If an employee elects to exercise this option, he/she will pay the difference between the plan costs.

The Employer continues its current practice regarding dental insurance, the $10,000 life insurance policy, and the death and disability policy.

The insurance provisions of the collective bargaining agreement applicable to the Secondary Roads unit are identical, except for non-substantive differences in the first paragraph, which provides:

> The Employer agrees to make available a health and major medical group insurance program selected by the Employer for each eligible regular full-time employee. An employee shall pay $48.00 per month toward the single premium cost for the duration of this agreement. The Employer will pay the balance of the premium cost during all three years. An employee shall pay $103.00 per month toward the family premium for the duration of the agreement. The Employer will pay the balance of the premium cost during all three years.

These agreements were the products of negotiated settlements reached in the spring of 2008 which had involved separate (but similar) bargaining and mediation sessions, during which the County had been represented by its human resources consultant, Jack Lipovac, and AFSCME by its staff representative, Otto Groenewald.

In its initial proposal for a successor contract for the secondary roads unit, AFSCME had proposed to add to the existing contract's insurance provisions the sentence: "The plans provided shall remain equivalent to the plans in place as of June 30, 2007 for the term of this agreement." (Exhibit A). AFSCME's initial proposal for the sheriff's department unit proposed the addition of similar insurance language: "The plans provided shall remain equivalent to the plans in place as of June 30, 2008 for the term of this agreement. (Exhibit D).

During the secondary roads unit's negotiations, and either at or following mediation for the sheriff's department unit, AFSCME dropped its proposals for the inclusion of a "remain equivalent" provision, and such language is not contained in either of the finalized agreements.[2]

Sometime in the spring of 2009 the County was informed by its insurance administrator that the costs of its current employee insurance coverage would increase for the coming year. The County notified Lipovac and began to consider possible

[2] The evidence concerning why AFSCME ultimately abandoned these proposals is in sharp dispute. Groenewald testified he did so in reliance on assurances from Lipovac at the bargaining sessions on March 6, 2008 that the insurance benefits would remain unchanged during the term of the agreements and that the language was thus unnecessary. Lipovac denied making such an assurance and testified that he would never voluntarily bind an employer to such a commitment in a multi-year agreement due to the potential volatility of future insurance costs, suggesting that something he may have said about insurance in another context may have caused misunderstanding by AFSCME. Like the ALJ, under the theory advanced by AFSCME here, we do not think it necessary to make specific findings that the alleged oral assurances were or were not made because they would not be determinative of the outcome in this case.

changes to the existing plan that would reduce costs while continuing to provide employee coverage. In late April or early May, Lipovac contacted Groenewald about the situation, advised that the County wanted to make changes to the employee insurance plan, and offered to meet to discuss alternatives.

Although the record is short on detail about precisely how it came about and precisely who was in attendance, a meeting between at least Lipovac, AFSCME representative Earlene Anderson (filling in for the temporarily unavailable Groenewald) and an employee in the sheriff's unit was subsequently arranged and took place on May 29, 2009. In connection with the discussion which occurred, the County presented AFSCME with a memorandum describing the County's planned increases in the insurance plan's health and major medical deductibles, out-of-pocket maximums and prescription plan deductibles, to be effective July 1. AFSCME's representative(s) felt they had a contract which bound the County and indicated they had no interest in making any modifications to the insurance program, warning that if the County made insurance changes, a prohibited practice complaint would be filed with PERB.

Although details are not in the record, on June 3 Lipovac and Groenewald discussed "possible options concerning the health insurance" in a telephone conversation.

On July 10 the County's board of supervisors issued a letter notifying the presidents of the unions representing County employees that, having had met with union representatives to negotiate potential changes in the health care plan, the County was going to proceed with the changes.

On June 16 Lipovac and Groenewald again discussed the insurance program, apparently exploring things they might do to reduce the impact of the proposed changes on the AFSCME-represented employees, including the possibility of the County picking up some of their out-of-pocket maximum or reducing the AFSCME-represented employees' premium contribution to the amount paid by other County employees. Lipovac and Groenewald apparently agreed to contact their respective constituents to gauge the acceptability of these ideas. However, on June 17 Groenewald informed Lipovac that the employees were unwilling to negotiate any changes to the current insurance, asserting the position that there was an agreement on insurance already in place.

On June 18 Lipovac sent a memorandum to Groenewald which recounted the discussions which had occurred in response to the County's proposed changes to the health insurance program and restated his understanding that AFSCME would not agree to any changes in the current insurance plan. The memo indicated that the County would institute the previously discussed changes

effective July 1, but also expressed the County's willingness to provide AFSCME with additional opportunity to bargain over the changes and invited Groenewald to contact Lipovac to set up another session prior to July 1.

AFSCME did not seek a further meeting with the County. Groenewald signed the instant prohibited practice complaints on June 18, 2009, and mailed them to PERB, where they were received June 23. Pursuant to Iowa Code section 17A.12(9), the complaints are deemed filed on June 19, 2009 – the date of their U.S. postal service postmark.

The County implemented its proposed changes to the insurance plan, effective July 1, 2009.

CONCLUSIONS OF LAW

In its complaints, AFSCME generally alleged the County's violation of Iowa Code sections 20.9 and 20.10, but later clarified its claims as allegations that the County committed prohibited practices within the meaning of sections 20.10(1) and 20.10(2)(a), (e) and (f) when it made unilateral changes in a mandatory topic of bargaining. Those sections provide:

> 20.10 Prohibited practices.
>
> 1. It shall be a prohibited practice for any public employer, public employee or employee organization to willfully refuse to negotiate in good faith with respect to the scope of negotiations as defined in section 20.9.
>
> 2. It shall be a prohibited practice for a public employer or the employer's designated representative willfully to:

a. Interfere with, restrain or coerce public employees in the exercise of rights granted by this chapter.

. . .

e. Refuse to negotiate collectively with representatives of certified employee organizations as required in this chapter.

f. Deny the rights accompanying certification or exclusive recognition granted in this chapter.

In prohibited practice proceedings, the complainant bears the burden of establishing each element of the charge. *See, e.g., Broadlawns Medical Center,* 05 PERB 6894; *Tama County,* 05 PERB 6756; *State of Iowa (Regents),* 04 PERB 6506.

I

The County asserts that because the collective agreements call for the provision of an insurance program "selected by the Employer" and make the program "subject to all terms and conditions of the contract with the insurance carrier(s) selected by the Employer," they grant it the authority to do what it did. This is a claim that AFSCME has bargained away or waived its right to negotiate changes in the insurance benefits, as long as some health and major medical group program is offered at the specified employee cost.

Such a waiver by a union of its statutory bargaining rights will not be readily inferred. There must be a clear and unmistakable showing that a waiver occurred, or that a union has bargained away its statutory rights to bargain on a mandatory

subject. *Cedar Rapids Assn. of Fire Fighters,* 97 PERB 5129 & 5179. Thus, the initial issue here is whether, by agreeing to the language quoted by the County, AFSCME waived its right to negotiate over all changes to all aspects of section 20.9 "insurance" other than the existence of a health insurance program at the specified price.

The parties have devoted a good deal of attention to their differing interpretations of the "selected by the Employer" language. Rather than some extended discussion, we think it sufficient to say that we think the agreements' insurance provisions are not without ambiguity or uncertainty, as the parties' stark differences of opinion about the language's meaning aptly demonstrate. We certainly cannot fairly conclude that it constitutes a clear and unequivocal waiver of AFSCME's bargaining rights as to virtually all mandatory aspects of the mandatory topic of insurance. We thus reject the County's claim that it had no bargaining obligation in connection with the insurance changes it implemented, and turn to the issue of whether it fulfilled its bargaining duty before implementing the insurance changes.

II

The law concerning "unilateral change" cases such as this is well settled and has been discussed and applied in a number of PERB decisions. An employer's implementation of a change in

a mandatory subject of bargaining without first fulfilling its applicable bargaining obligation may constitute a prohibited practice under the sections quoted above. *See, e.g., Des Moines Independent Community School District*, 78 PERB 1122; *City of Waterloo,* 2001 PERB 6171. In *Des Moines Independent Community School District* the Board summarized the duty of the parties as follows:

> First, during the life of the contract, neither party has a duty to discuss any proposed modification of any term "contained in" that contract, and the Board has held it a corollary that neither party may lawfully insist on such a discussion. Thus, a mid-term modification of any such "contained in" term may be lawfully made only after the consent of the opposing party has been voluntarily given.
>
> Second, even if not "contained in" the contract, neither party may lawfully during the contract term implement a change in wages or other working conditions unless it has first bargained with the other party, that is, has given notice of the change and an opportunity to negotiate about it to impasse. (Usually the employer will seek to make the change and the union to resist it). In short, the duty not to make unilateral changes on mandatory bargaining subjects subsists during the contract term as well as during negotiations. Gorman, LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING, at 457 (1976).

The threshold question in cases alleging an unlawful unilateral change is whether the matter "unilaterally changed" constitutes a mandatory subject of bargaining. In this case, no one questions that the changes made in health insurance deductibles, out-of-pocket maximums and prescription drug deductibles fall within the meaning of the section 20.9

mandatory topic of "insurance."

Because the nature of the employer's bargaining obligation differs depending upon whether the mandatorily negotiable term is "contained in" the collective bargaining agreement or not, we must examine the contract itself. In making such determinations, PERB has long rejected the broad view that if any provision relating to a particular section 20.9 topic is contained in the contract, then all matters concerning that mandatory subject are deemed to be contained therein. *Cedar Rapids Assn. of Fire Fighters,* 95 PERB 4898.

AFSCME's argument on appeal is simple and direct. It points out that the County's obligation was to provide a plan "selected by the Employer," and notes that the word "selected" is in the past tense. This word usage, it argues, clearly shows both that the selection of a plan had already taken place, and that the plan would be for the duration of the agreement.[3]

We think the agreements are not so clear. On their faces, they do not expressly provide when a plan is to be "selected by the Employer," or that the employer's selection is binding for the duration of the agreement. Other portions of the contracts' insurance articles do, however, make specific references to

[3] AFSCME thus maintains that the particulars of the plan in effect on July 1, 2008, were incorporated by the "selected" reference, and that all features of the plan are thus contained in the agreements. Under this view, the County failed to fulfill its bargaining obligation because it did not obtain AFSCME's consent to the changes, and thus committed prohibited practices when it implemented them.

duration by specifying the amount an employee will pay "for the 2008-2011 fiscal years," and what the Employer will pay "during all three years."

Much as we were unable to conclude that this language constituted a clear and unequivocal waiver of AFSCME's right to bargain over insurance changes, we are unable to readily conclude that it fully incorporated all aspects of the plan in place on July 1, 2008 when the collective agreements became effective. While not controlling, we think the fact that AFSCME initially made, but subsequently abandoned, proposals to add contractual provisions designed to accomplish precisely what AFSCME now argues the existing language already accomplished, only supports our conclusion.

What the agreements do contain is the commitment to offer a health and major medical insurance program, at a specified cost to the participating employee. AFSCME does not claim that either of those matters was changed by the County. The program's specific benefits and coverage details and limitations, including deductibles, out-of-pocket maximums and prescription drug costs are not, however, contained in either agreement.

Having concluded that the changes implemented by the County were to mandatorily negotiable matters not contained in the agreements, we think the remaining analysis and result is

apparent. When dealing with mandatory matters not contained in the contract, we have long held that the employer may lawfully make changes to them during the contract's term if it has given the union notice and an opportunity to bargain. *See, e.g., Des Moines Independent Community School District,* 78 PERB 1122. The Union then has the power to either participate in or waive bargaining. *Id.* If the union chooses to bargain, the employer has an obligation to bargain the matter in good faith to the point of impasse before making any change. *Id.*

Although it claims that it had no obligation to do so, we think the record plainly shows that the County nonetheless fulfilled its bargaining obligation in this case before it implemented the insurance changes, and that the ALJ's analysis and ultimate conclusion to the contrary was in error. [4]

In late April or early May, 2009, Lipovac contacted Groenewald on the County's behalf, notified him that the County wanted to make changes to the insurance plan and offered to meet

[4] The ALJ appears to have concluded that the "selected by the Employer" language incorporated the specifics of the "selected" plan into the agreements and precluded the County from making any changes without AFSCME's consent. Although it is apparent from what we have said above that we think this conclusion was in error, one would expect that it would have been dispositive for the ALJ, since it is clear from the record that the County did not obtain AFSCME's consent to the changes. The ALJ, however, nonetheless went ahead to discuss and purportedly apply the analysis used in cases involving changes to not-contained-in matters, and ultimately concluded, for reasons that are not completely clear to us, that the County "decided not to bargain with the Union" and that it thus committed prohibited practices when it implemented the insurance changes. Although we agree with the ALJ that the County claimed that it had no obligation to do anything because of the language of the agreements, we think his apparent conclusion that the County did not provide an opportunity to bargain or in fact bargain ignores what the County actually did, and is in error.

and discuss the matter. The parties met on May 29, 2009, and the County described its proposed changes in detail. Although presented with this opportunity to bargain or to at least demand bargaining over the proposed changes, AFSCME took what we think was the mistaken position that the County was bound to maintain the plan then in place and informed the County that if any changes were made to the plan without its approval a prohibited practice complaint would be filed with PERB.

Notwithstanding AFSCME's stated position, on at least two additional occasions Lipovac had further discussions with Groenewald about the proposed changes, including the exploration of ways to minimize their financial impact on AFSCME-represented employees. Although Groenewald apparently considered and discussed with AFSCME members the ideas the parties had discussed on June 16, the next day he restated AFSCME's position that an agreement on insurance matters was already in place, and expressed the Union's unwillingness to negotiate any changes to the insurance *status quo*. Although the County expressed its continued willingness to provide additional opportunity to bargain in Lipovac's memo of June 18, AFSCME sought no further discussions.

We think it is thus apparent that the County gave AFSCME notice of its proposed changes and an opportunity to bargain

over them, and in fact bargained to the extent AFSCME sought to do so.

We thus conclude that the County fulfilled its bargaining obligation before it implemented the changes to the insurance plan, and that its subsequent implementation of the changes to mandatory insurance matters not contained in the collective agreements on July 1, 2009 did not constitute prohibited practices as alleged in the complaints.

IT IS THEREFORE ORDERED that the prohibited practice complaints filed by AFSCME/Iowa Council 61 are hereby DISMISSED.

DATED at Des Moines, Iowa this 2nd day of February, 2011.

PUBLIC EMPLOYMENT RELATIONS BOARD

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